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Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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STATE OF UTAH
IN THE COURT OF APPEALS

DAVE HONRUD and STEPHANIE HONRUD,

Plaintiffs/Appellees

v

DALE KERSEY and BARBARA KERSEY,

Defendants/Appellants.

REPLY BRIEF OF APPELLANTS

APPEAL #: 920851

District Crt # C 91-4831

REPLY BRIEF OF DEFENDANTS/APPELLANTS

A PRIORITY 15 UNCATERGORIZED APPEAL FROM
THE THIRD DISTRICT COURT, SALT LAKE COUNTY, JUDGE STIRBA

FILED
Utah Court of Appeals

APR 23 1993

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LEGAL PROVISIONS PURSUANT TO RUCA 24(a)(6) & (f)

URCP 56 (e) states in pertinent part:

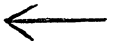
(e) Form of affidavits; further testimony; defense required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissable in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in the affidavit shall be attached thereto or served therewith ... Emphasis Added.

URCP 11 states in pertinent part:

...The signature of an attorney constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information and belief formed after reasonable inquiry it is well founded in fact and warranted by existing law, or a good faith argument for the extension, modification or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation ... If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose on the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, motion, or other paper including a reasonable attorney's fee. Emphasis Added.

Rule 806. Attacking and supporting credibility of declarant.

When a hearsay statement, or a statement defined in Rule 801(d)(2), (C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with his hearsay statement, is not subject to any requirement that he may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine him on the statement as if under cross-examination.



ARTICLE VIII.

HEARSAY.

Rule 801. Definitions.

The following definitions apply under this article:

(a) **Statement.** A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.

(b) **Declarant.** A "declarant" is a person who makes a statement.

(c) **Hearsay.** "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) **Statements which are not hearsay.** A statement is not hearsay if:

(1) **Prior statement by witness.** The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is (A) inconsistent with his testimony or the witness denies having made the statement or has forgotten, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving him; or

(2) **Admission by party-opponent.** The statement is offered against a party and is (A) his own statement, in either his individual or a representative capacity, or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

Rule 802. Hearsay rule.

Hearsay is not admissible except as provided by law or by these rules.

Rule 803. Hearsay exceptions; availability of declarant immaterial.

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) **Present sense impression.** A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter.

(2) **Excited utterance.** A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(6) **Records of regularly conducted activity.** A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) **Absence of entry in records kept in accordance with the provisions of Paragraph (6).** Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of Paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

TABLE OF AUTHORITIES

Cases:

UNDERSCORED CASES ARE THOSE CITED PREVIOUSLY IN APPELLANTS' BRIEF

DETERMINATIVE CODIFICATIONS ARE SET FORTH VERBATIM IN APPELLANTS' ADDENDUM

APPELLEES' STATEMENT OF THE CASE

Buyers correspondence to Sellers dated 4 June 1991 demanded "payment for the repairs" (R - 74, para 4) regarding a "flame disturbance" stated in the 20 April 1991 Mountain Fuel Notice. R - 58. This Notice expressly suggested "proper repair, corrections and a complete inspection" not installation of a new furnace, and definitely did not record the presence of a crack (lately denominated a "hole" in Appellees' Brief, p 16) or toxic gas on 20 April 1991.

Sellers, nonetheless, served an Offer of Judgment (R - 17) to cure the alleged deficiency. Buyers refused to permit repair of the condition Buyers said was observed by others on 12 September 1991, about five months after the closing of the sale. R - 47, # 19. Buyers seek to negate their refusal to allow the Sellers' attempt to repair by proffering inadmissible hearsay purportedly said about 26 April 1991, before Buyers ever contacted the Sellers, alleging that the furnace was irreparable (R - 45, # 8), however Buyers adopted a statement of a Mountain Fuel representative that tends to prove that a repair was possible and proffered it to the lower court at the hearing. Trans 2, L 9. This statement was supposed to have been uttered when the purported defect was alleged first to have been observed on 20 April 1991. Buyers never swore they personally observed a crack or "hole", and nor could their attorney. R - 43-48.

Consistent with Buyers' refusal of repair, they precluded replacement of the furnace with another used furnace, additionally swearing in Buyers' Affidavit more inadmissible hearsay of another un-named declarant that "used furnaces were very unpredictable" (R - 47, # 18), thus rebutting the contention (Buyers' Brief, p 5) that they would have permitted replacement with a used furnace. Contrary to

Buyers' assertion, they had other alternatives than demanding the value of a new furnace and filing suit; for example, negotiating directly with Sellers. R -66, 17-19.

Sellers inadvertently incorporated the course of procedure in the lower court in their Brief after inaccurately noting the date on Buyer's Affidavit, 12 November 1991 (R - 48) and assuming the motion for summary judgment it supported was also filed then rather than on 11 December 1991. R - 26. 12 November 1993 was about ten days after Sellers sent Buyers a third Offer of Judgment in answer to Buyers' complaint. R - 19. The rejection of this third Offer was announced by receipt of Buyers' motion for summary judgment. As appears from the record below, Sellers had refrained from the expense of formal discovery while attempting to settle the matter fairly and economically through negotiations concerning the Buyers' demand for the value of a new furnace.

Sellers responded to the Buyers' motion by objecting that summary judgment would abrogate a fair opportunity to cross-examine the witnesses whose hearsay was stated in Buyers' affidavit against Sellers. Discovery would have permitted Sellers to refute the hearsay attributed by Buyer/affiants to these un-named declarants, even if cross-examination at trial was abated. R - 61, # 3 - 5. Hence, although Buyers are correct that their motion was not filed ten days after the Answer, the rejection of Sellers' third Offer of Judgment by service of Buyers' motion did have the same preclusionary effect on discovery as would filing the motion ten days after the 28 August 1991 Answer to the complaint served on 13 August 1991.

Nature of the Case

Contrary to facts in Buyers' Brief, Buyers failed to comply with the requirements of **Cabrera v Cottrell**, 694 P2d 622, 624 (Ut 1985) fettering judicial economy and needlessly increasing the attorney fees they sought at the hearing of their motion for summary judgment. Buyers withheld the itemized evidence which prevented the lower court from complying with **Cabrera** by finding facts and stating conclusions of law in its judgment as to the fairness and reasonability of the attorney fees sought. Sellers objected to Buyers' deficient affidavit (R - 23 & 24). R - 61, # 7; 65, # 21-23; & 96; Trans 29 - 30.

Instead of finding attorney fees were waived in accord with **Cabrera v Cottrell,supra**, p 624 for failure to adduce evidence in support of reasonable attorney fees at the motion hearing, the lower court permitted a second, separate opportunity after the initial hearing of the motion for summary judgment for Buyers to submit the omitted evidence of attorney fees. R - 23-24 vis-a-vis R 107-114. The lower court initially stated <u>the amount of attorney fees seemed high in consideration of the amount in dispute</u> before erroneously extending the Buyers the second opportunity to subsequently submit the omitted evidence after the hearing instead of finding the fees waived consistent with case law. Trans, p 30. **Dixie State Bank v Bracken**, 764 P2d 985, 990 (Ut 1988), nte 8, as cited by Buyers, actually augments the holding of **Cabrera** that an affidavit <u>in the first instance</u> must state with particularity evidence entitling a party to the amount of attorney fees sought or those fees are waived.

Appellees' Statement of Facts

1. There is no evidence introduced on the record below that the contract Buyers' chose to use in this case was approved by the Attorney General or a Commission. Furthermore, decisons of the Office of the Attorney General are not precedental; for example, it previously allowed a state agency to summarily strip two dentists of their licenses without a due process and substantial damages were paid for denial of such commonly understood constitutional rights. Insertion of irrelevant facts about the commission and Attorney General vis-a-vis the form of Agreement chosen by Buyers are immaterial on appeal and do not assauge the rule that the contract terms are to be construed against the Buyers as draftors.

3. Buyers admit that the heating system need only work satisfactorily at closing and no later. General Provision C.

4. Buyers admit "except for express warranties," all other provisions contained in the Agreement are contracually abrogated after execution and delivery of closing documents. General Provision O. Therefore, only General Provision C may survive the closing and General Provision N, that addresses default or refusal to close the sale and entitlement to attorney fees for failure to effectuate the closing, likewise is entirely abrogated by the express operation of General Provision O that contractually nullifies Buyers' demand for attorney fees on appeal as well as in the lower court according to the contract the lower court had before it and was duty bound to construe in its entirety and to give effect to its terms as completely as practicable, as discussed hereinafter.

7. Buyers could have continued use of the furnace upon immediate possession after the closing if they had the gas service continued in their name. Since they neglected to do so, Sellers had the gas turned-off on the day of closing and the gas, according to the record below, was turned-on at Buyers' option five days later. The furnace purportedly was operated on a Saturday, 20 April 1991 after 5:00 P.M. and then shut-off after operation for a flame disturbance. R - 58. The Notice contradicts Buyers' assertion that the gas pipes were disconnected or had to be connected or hooked-up before the gas was turned-on, furnace lighted, operated and the flame observed. R - 58.

8. The Notice directly rebuts Buyers' assertion that a Mountain Fuel employee refused to light the furnace or that any gas line was cut (Trans 25, L 15), since logically the gas already must have been connected for the furnace flame pattern to be noted. Trans 22 -24, 15. No Mountain Fuel employee would swear an affidavit authenticating the Notice was completed in the normal course of business or when, and if, the "large crack" or "hole" existed apart from the Notice. R-110-111.

9. Buyers frustrated Sellers' attempt to contact Buyers' agent/inspector and obstructed negotiations. R - 67, 68, 69 para 3. Buyers' inspector admitted he observed no defect in the furnace prior to the closing and that he had been induced to return the inspection fee to Buyers. R - 66, 64 # 9 & 17. This admission, a URE 801(d)(2) hearsay exclusion, by Buyers' inspector/agent about the refund, was substantiated by Buyers' counsel and never denied. R -83; 64, # 9 & 17

11. No admissable evidence from any person purported to have been present on 12 September 1991, five months after the closing, swears to Buyers' hearsay contention that others observed a large crack.

12. Likewise, Buyers' self-serving, inadmissable hearsay about irrepairability is unsubstantiated by an affidavit of a Mountain Fuel employee and is contradicted by Buyers. Trans 2, L 9. Also, p 1 supra.

13. Contrary to Buyers' erroneous assertion, Sellers most certainly did directly contradict that the furnace was in unsatisfactory working condition on the day of closing through personal knowledge of Seller/affiant. R - 64, para 10, 11, 17 & 9. While Buyers erroneously complain Sellers failed to present a countering legal position to the motion for summary judgment, they inconsistently carp that documents Sellers filed to counter the motion "contained numerous conclusions of law." R - 60-79 & R - 93-96.

15. Buyers mis-state that "Sellers admitted during oral argument that there were no facts before the court to refute Buyers' evidence" and "Sellers submitted no evidence to dispute the defective condition of the furnace," that is the hearsay crack purported by Buyers. Sellers, within the limited scope of the question posed by the lower court about whether "<u>according to Plaintiff</u>" others saw a crack on 12 September 1991, five months after the closing, confirmed that was what Buyers held and at no time did Sellers concede as accurate Buyers' speculation about what these others may have seen and concluded, nor could Sellers' counsel ethically offer his testimony. Trans 8 - 10. More reliably Buyers' contention about the condition of the furnace on 12 September 1991 was specifically rebutted on oral argument from direct personal knowledge of the satisfactory condition of the furnace <u>on the day of closing</u>, 15 April 1991, in Sellers' affidavit and by inference from Buyers' inspector's admission. Trans 12-13, R - 64, para 9, 10, 11, 17.

16. On summary judgment in this case where the right to have a jury as fact finder was demanded, the judge is proscribed by law from drawing inferences of facts against the non-moving party to the effect that because a condition existed five days after the closing that condition must have existed at or before the closing of the sale, especially when directly rebutted by averments R - 64, para 9, 10, 11, 17. Such factual determinations are committed by law to the prerogative of the jury contrary to Buyers' erroneous assertions.

17-18. No re-litigation of the unreasonability of Buyers' attorneys' fees exists. Buyers'affidavit (R - 23) was found inadequate to adduce an award of attorney fees during the motion for summary judgment (Trans 29-30). Attorney fees should have been found waived for disobeying the itemization requirements and principles of judicial economy held as a failure of proofs in **Cabrera and Dixie State Bank.** While the lower court erroneously found Buyers entitled to attorney fees, it initially refused to decide on the reasonability of the amount sought and erroneously delayed the issue since Buyers withheld adequate proof at the hearing contrary to precedent. On the record the lower Court refused to hear Sellers' argument that the amount of fees caused by Buyers' recalcitrant tactics were unreasonable and unmitigated, although such argument is relevant and material to the determination of attorney fees as held in **Dixie State Bank, supra,** p 991. Trans 18-19. Since the lower court offered Sellers might object again later, doing so after receipt of the itemization that should have been submitted as required by law at the earlier hearing could not be re-litigation and Sellers' counsel should not be sanctioned for opposing the unreasonability of specific itemizations seen for the first time only after the hearing. Trans 29-30.

ARGUMENT I
INADMISSABILTY OF BUYERS' AFFIDAVIT
A

Buyers attempt to bootstrap into admissability, by use of a Notice to repair, self-serving hearsay purportedly stated by a Mountain Fuel employee who refused (R - 111) to aver by affidavit those statements. R - 58. R - 110-111 was withheld from the lower court by Buyers during the hearing of the motion for summary judgment and demand for attorney fees, contrary to the requirements of **Cabrera and Dixie State Bank**, although entries of 10/23 - 10/30 are probative of Sellers' position that Mountain Fuel would not aver hearsay in Buyers' affidavit, so Buyers merely proffered their own inadmissable hearsay in their affidavit to accomplish their objective, a new furnace rather than a repair or comparable replacement. Trans 2, L 9.

The Notice on face is unsigned by the creator, the Order Number expected to appear in the usual course of a business using such a form is absent and the Notice expressly suggests repair, not a new furnace, contrary to Buyers' extrinsic hearsay about unrepairability. Such inconsistencies render questionable the authenticity of Notice pursuant to URE 806 (6). The absence of any notation about the presence of a "large crack" or "toxic gas" on 20 April 1991, urged on the court through Buyers' extrinsic hearsay, is actually probative of the non-existence of those conditions since such grave concerns are not included in the Notice where one would expect them to be recorded. URE 803 (7).

G.M. Dev v Community American, 795 P2d 827 (Ariz App 1990) is cold comfort for Buyers since the holding regarding the admissability of hearsay statements as evidence in a G.M. president's affidavit was founded upon facts demonstrating that this president was an employee

of a business who was familar with, and could authenticate, the records normally kept in the course of the business over which he presided and his averments were directly derived from records that he could verify were authentic and normally kept in the course of the business over which he presided. The Buyers' instantly did not sustain the burden to produce an affidavit from any employee familar with the operation of Mountain Fuel who could mimic the authenticating function served by the president in the **G. M. Development** case. Furthermore, the hearsay extrinsic to the Notice, regarding a crack, toxic gas, impossibility of repair and necessity of a new furnace vis-a-vis the express content of that Notice, indicates a lack of trustworthiness, especially where the business that purportedly generated the content of the Notice refused to provide Buyers an affidavit to authenticate the hearsay document, unlike the facts in **G. M. Development.** R - 110-111, entries 10/23-10/30.

This Notice and other unsubstantiated, extrinsic hearsay that Buyers ascribed to Mountain Fuel on 20 April 1991, when Buyers finally had the gas service placed in their name and turned-on, clearly does not rebut Sellers' affidavit swearing that the furnace was in satisfactory working condition when it was turned-off on 15 April 1991, the date of closing when Buyers took exclusive possession of the residence and the risk of loss contractually passed to them through General Provision P of the Agreement. If water pipes froze and burst as a result of Buyers' neglecting to heat the premises for the five day period after closing, Sellers would not be responsible for that loss any more than they would be for a furnace defect that purportedly arose five days after they took possession of the premises, according to hearsay Buyers/affiants offer, not their own personal observation.

Hearsay of another unsworn declarant who refuses to provide an affidavit is not competent evidence for inclusion in Buyers' affidavit pursuant to URE 801 and URCP 56(e). R - 110-111, entries 10/23-10/30.

Buyers affidavit fails to controvert Sellers averment that the furnace was in satisfactory working condition at closing (R -64, # 9, 10, 11 & 17). Summary judgment should have been granted in favor of Sellers, since precedent constrains the lower court from drawing inferences against non-moving Sellers from statements allegedly heard by Buyers about the purported condition of the furnace five days after the closing. Buyers, moving parties, produced no sworn evidence contradicting that the furnace was not working satisfactorily at closing or before and the agent Buyers hired to exercise their right of inspection admitted finding the furnace satisfactory before closing. G.M. Development, supra, p 831-832.

II
CONTRACTUAL AMBIGUITY

Big Cottonwood Tanner v S.L.C., 740 p2d 1357, 1358-1359 (Utah App 1987) holds not only that the Court of Appeals may deduce its own contractual interpretation and not defer to the lower court as a question of law, but also that all parts of the agreement should be given effect if it is reasonably practicable to do so to achieve the purpose of the earnest money agreement upon review of the entirety of agreement. Jones v Tinkle, 611 P2d 733, 735 (Ut 1980). The purpose of the subject Agreement is to cause the parties to close the sale and once that is concluded the entirety of the Agreement, including but not limited to General Provision N for attorney fees, is abrogated and unenforceable according to General Provision O. R - 52.

Earnest Money Sales Agreement, General Provision C, as confined by its terms, warrants specific systems to be in satisfactory condition at closing, when the risk of loss passes to Buyer (General Provision P, R-52). It does not extend the warranty to conditions arising beyond that date and this limitation comports with General Provision O which abrogates the entirety of the Agreement upon execution and delivery of final closing documents, "closing," excluding warranties that expressly continue and are preserved, unless excepted elsewhere in the contract; for example, by clause 1(e). Accordingly, when the closing triggers General Provision O, General Provision N is abrogated in its entirety including the attorney fees terms that are available if a party defaults by failing to close.

General Provision C contains no terms entitling a party to attorney fees for enforcement of warranties on appeal or otherwise. After the purpose of the Earnest Money Sales Agreement and General Provision N , the close of the sale, was consumated, the Buyers were contractually precluded from attorney fees on appeal or otherwise, since the lower court is required by law to review the entirety of the contract before ruling on summary judgment and General Provision N in its entirety, including the terms regarding attorney fees, is entirely abrogated by General Provision O, along with all other provisions that are not expressly preserved.

Buyers misplace their reliance on **Brooks v Hodges**, 606 P2d 77, 78-79 (Col App 1979) wherein the parties were extended their full panoply of due process rights at trial. The **Brooks** buyers went to the residence on the day of closing and personally experienced and observed the change of condition between the date the agreement was signed and the closing. Buyers and their professional rug cleaner

testified about the presence of animal odor and hardened excrement in the rugs and their repair attempts. This was sufficient reliable evidence for the trier of fact to conclude at trial that conditions had changed before closing, not after.

The factual bases for the Colorado court's holding in **Brooks** are inapposite to those instantly. First, the **Brooks** parties enjoyed a trial where fact finding was appropriate. Instantly a motion for summary judgment was heard where fact determinations were to be precluded and any inferences of fact decided in favor of the non-moving party, Sellers. The lower court erroneously found facts and drew inferences favoring the moving party, Buyers, about when the purported breach of condition occured. Second, in **Brooks** direct testimonial evidence of persons who personally experienced and actually observed the non-conformity was received subject to cross-examination that demonstrated the proofs were credible and reliable. Instantly Buyers offer unreliable hearsay of an unidentified declarant whose Mountain Fuel attorney declined an affidavit corroborating the statements Buyers proffer declarant stated. Buyers never swore that they personally observed or experienced any flame disturbance, crack, split, "hole," or toxic fumes at any time after the closing. Third, there was not a lapse of five days before buyers chose to go to the residence in **Brooks** and this reasonably assured the trier of fact could find as certain the non-conformity occurred before the closing, not after. **Brooks, supra**, p 78. Fourth, Buyers in **Brooks** were not parties to an agreement that contained an abrogation clause like General Provision O that must be construed against Buyers, draftors, as abolishing the agreement upon closing.

Buyers never swore why they did not expeditiously continue the gas service in their own name during a cold April 1991 or why they waited until the Saturday night after the Monday closing to have the gas turned-on.

Sellers' Affidavit unequivocably avers the furnace was working satisfactorily on the day of closing when the gas was turned-off. If the alleged flame disturbance did exist five days after the closing, it certainly resulted after the closing and no inference to the contrary is permissable on summary judgment. Paragraphs 9, 11, and 17 aver facts that are probative of and tend to substantiate the soundness of the furnace at closing. Still Buyers claim Sellers provided no evidence to contradict the Buyers' hearsay, while submitting no evidence that reliably proves a flame disturbance developed before the closing. Hearsay about what another alleges to have observed five days after closing does not provide reliable evidence to posit development of the condition prior to closing.

Buyers' business record, (R - 15 or 58), purporting to reference the condition of the furnace after the gas was turned-on and the furnace was operating five days after the closing notes only a "flame disturbance." Buyer's embellished the Notice with self-serving, but inadmissible, hearasay statements at the hearing and in their affidavit, which clearly is absent verification of personal knowledge, observation or competence to testify as to whether the purported crack was present before closing.

There was no admissable or credible evidence offered by Buyers' affidavit below that proved the furnace irreparable, the gas was "disconnected," the gas needed to be "hooked-up" or that a "hole" ever

existed. There was, however, proof in the record below that Buyers' had refused to permit Seller's a repair attempt and then offered hearsay as the reason for that refusal. If Buyers could establish a prima facie case, it is directly rebutted by Sellers' affidavit. Sellers should be granted summary judgment, according to **Jones, supra**, p 736 and **G. M. Devel, supra**, p 832 or remand for trial.

III
DAMAGES, FEES, AND OTHER ERRONEOUS MONETARY AWARDS
A

Buyers cite to irrelevant precedent concerning breach of a contract for services rendered and materials to construct a project that is factually inapposite to the instant case about the purchase of a residence and hornbook law teaches the plaintiff should prove the difference in the price paid for the residence with a used furnace less proof of the value of that same residence with a purportedly infirm furnace. **Keller v Deseret Mortuary**, 455 P2d 197, 198 (Ut 1969). The bargain instantly was for a purchase of a residence, not a furnace, nor for construction of a project. The correct measure of damage, if a breach is proven, compensates fairly for the loss of value in the residence and is the most "practical and accurate" method of ascertaining damages. **Even Odds v Nielson**, 448 P2d 709, 711 (Ut 1968).

Sellers submitted proof that the furnace was in an older home and it follows from rational inference in Sellers' favor that the furnace was older, used not new. R - 64 & 65, # 11, 12, 15, 20. Buyers posit the convoluted argument that <u>Sellers</u> failed to meet the burden of proof of damages as an artifice to misdirect scrutiny away from Buyers' failure to sustain the burden of adducing proper or sufficient

evidence to ascertain the amount of the damages with adequate certainty. Buyers' inability or unwillingness to adduce such proof does not per se shift the burden to Seller as Buyers erroneously state in their Brief, page 26 without supporting precedent. In effect Buyers argue since they did not adduce proper proofs because it is too arduous for them, the court should merely defer to their demand for a new furnace. Buyers on motion for summary judgment should not expect lower court, frustrated by Buyer's lack of accurate proof, to succumb to Buyers' demand for the full value of a new warranteed furnace.

The fairer and more accurate measure of damage reasonably is the diminution of the value of the house purportedly caused by the deficient furnace. Upon Buyers' inability to prove loss of value in the residence by a bona fide expert like a residential appraiser or the loss of value in the existing used furnace absent the purported deficiency through an expert in furnace sales and repair, damages should have been denied for lack of sufficient proof, not awarded at the value of a new furnace.

If Buyers were entitled to be awarded damages to fairly put them in as good a position as if the contract were performed, as they contend, they could have adduced as proof of monetary damages the value of a satisfactorily working used furnace of the same age and type as in the house purchased and assured to them by their inspector.

As a third alternative, a proration computed upon proof of the price Buyers actually paid for the new furnace they allege installing might have sufficed had Buyers not withheld it. R-47, # 24).

Buyers' gratuitous proffer of facts on appeal, not sworn to below, about buying the furnace on installments at inceased cost interjects more inadmissible hearsay unsupported by business records to prejudicially skew the case on appeal just as was unfairly done in the court below. URCP 56(e).

Damages are money compensation for the proven value of a loss and even if Buyers desire a new furnace instead of permitting a repair or replacement, the proper amount of damages is not the value of a new furnace, THE BENEFIT OF BUYERS' BARGAIN IS THE VALUE OF A USED FURNACE, NOTHING MORE.

For the lower court to award the value of the bid for a new furnace unfairly compensated Buyers far in excess of the value of full performance of the Agreement. Such damages are an unfair windfall whose value extends far beyond the expected useful life of the furnace for which Buyers bargained. Ascertainment of damages is a factual issue to be tried to the jury and not a matter of law reposed in the judge on a motion for summary judgment.

What is most disturbing in Buyers' Brief, p 28-29, is the attempt to conceal from the courts and Sellers, by procedural machinations, Buyers' recovery of about $125.00 from Buyers' inspector/agent which forthrightly should have been applied by the lower court to mitigate Sellers' damages. URE 801(d)(2) allows admissions of an agent acting for a party-opponent like Buyers as evidence that Buyers extracted a refund of the inspection fee from their agent, especially when such admission is confirmed by the attorney agent of Buyers as a hearsay exclusion and the admission is set forth in the record below. R - 64, # 9 & 17; 66; 80; 83, para 2; 84, para 4; 68.

Buyers had the opportunity to deny the accuracy of the agent's admission about return of his fee to Buyers, but Buyers never denied same, nor do they in their Brief on appeal. They attempt, instead, to conceal the truth and avoid justice by erroneously stating nothing in the record supports Sellers' argument that Buyers did not mitigate. The admission of the agent is admissable as stated in Sellers' affidavit on knowledge and belief, since Buyers' agents did adopt these hearsay exclusions as true. R - 64; URE 801(1)(d). The burden is now on the Buyers/principals to deny them, but they can't and haven't so Buyers merely attempt procedural chicanery to avoid the truth. For this reason discovery and a fair trial should be extended on remand.

B & C
Awarding Attorney Fees Was Erroneous

It is well settled in Utah that attorney fees may not be awarded absent an entitlement in a statute or contract. In **Trayner v Cushing**, 688 P2d 856, 858 (Ut 1984) the Utah Supreme Court taught that parties are only entitled to fees if provided within the agreement, which the Supreme Court tightly construed in **Trayner** to deny fees. **Dixie State Bank, supra**, p 991.

As discussed earlier on appeal, review of a summary judgment is de novo in scope and instantly contractual General Provision N that permits recovery of attorney fees to enforce a default of the agreement to close the sale is absolutely abrogated after the closing by General Provision O of the controlling contract. Only warranties expressed to survive closing may do so. While General Provision C may transcend closing it plainly is devoid of any entitlement to attorney fees for warranty enforcement after the closing.

This limitation is as applicable on appeal as it is for services performed in the trial court. **Rosenlof v Sullivan**, 676 P2d 372, 376 (Ut 1983). Buyers are contractually prohibited from seeking attorney fees once the closing is concluded.

Cabrera, supra, p 624 and **Dixie State Bank** hold Buyers also waived any right they might putatively have to to claim attorney fees for failure to adduce adequate evidence to support reasonable attorney fees at the motion hearing and the judge found the affidavit inadequate, the fees high, and directed Buyers' counsel to subsequently submit a thorough itemization. Trans 29 & 30; R - 23. Sellers had accurately objected to the inadequacy of Buyers' affidavit, warning Buyers before the hearing but they did nothing to remediate the deficiency. Buyers' failure to conform to the evidentiary requirements established by the Supreme Court warrants the denial of attorney fees, especially where Buyers' omission needlessly increased the inconvenience and expense for the court and parties as well as offending judicial economy. R - 65, #22 & 23; 61, # 7; 62.

Although Buyers <u>waited thirty days</u> after the alleged discovery of the breach and chose to incur the expense of an attorney rather than contacting the Sellers directly for an expeditious cure (R - 77-78), although Buyers increased expenses by filing suit in response to Sellers' letter stating that Buyers' inspector found the furnace in average condition prior to the closing (R - 66), although Buyers rejected half the price of a new furnace to replace the used furnace and other offers and continued to demand the full price of a new furnace contrary to law (R - 19), although Buyers refused to allow Sellers an attempt to repair the purported problem, although Buyers refused to acknowledge the reduction of the damages sought from Sellers by the amount extracted from Buyers' inspector/agent, Buyers

now attempt to project their exacerbation of fees and intransigence onto Sellers to avoid denial or reduction of attorney fees taught as proper under the instant circumstances by **Dixie State Bank**, **supra**, p 991. **Murty** and **Vermont Low Income**, cited in Sellers' Brief, requires denial of fees.

The "amount in controversy" has always been a determining factor in assessing <u>reasonable</u> attorney fees, although no set formula exists and the award is not measured by the amount billed and hours spent. **Wallace v Build Inc**, 402 P2d 699, 700 (Ut 1965), **Cabrera**, **supra**, p 624. Factors in DR 2-106 or URPC 1.5(a), which duplicate those set forth in the **Johnson** case cited in Sellers' Brief, all include <u>the amount in controversy</u> as a substantial factor in assessing reasonability. Buyers' attorney fees are unreasonably four times the amount in controversy and the lower court initially looked askance at this disparity but later gave Buyers all the fees they demanded contrary to the abrogation of such entitlement by General Provision O of the contract. R - 29 & 30. Attorney fees are precluded instantly.

D

No Bad Faith Re-litigation of Reasonability Exists

Where the Buyers, contrary to the requirements of the Supreme Court as held in **Cabrera** and **Dixie State Bank**, failed to file itemized evidence of services rendered and fees with the motion for summary judgment and the issue of the unreasonability of those fees logically could not be addressed at that hearing and could only be opposed thereafter, fees are waived. Even the lower court found the fees appeared high in Buyers' superficial and wholly inadequate initial affidavit (R-23), but Buyers were granted the opportunity to submit the itemization later. Sellers should not be sanctioned for exercising the right to defend themselves against a demand for unfair attorney

fees in the same manner as permitted the litgants in Trayner, Dixie State Bank, and Cabrera, especially where the lower court gave Buyers a second bite of the apple after failure to submit sufficient evidence to establish the reasonability of the fees sought and the itemization initially withheld during the hearing of the motion for summary judgment proved exactly Sellers' point at the hearing for summary judgment - Buyers' affidavit relied exclusively on inadmissable hearsay because Mountain Fuel would not corroborate those hearsay statements Buyers' affidavit ascribed to a utility employee/declarant.

Exposing this chicanery does not justify the sanctioning of Sellers' attorney and according to Cabrera, supra, p 624, such obfuscatory tactics by Buyer that hinder the motion hearing and wastefully require additional court time, filings and expense merit a finding of the waiver of attorney fees according Cabrera (PAGE 7, supra).

IV
DISCOVERY AND A TRIAL SHOULD BE PERMITTED ON REMAND SO THE TRUTH CAN BE BROUGHT BEFORE THE COURT BY ADMISSIBLE EVIDENCE AND JUSTICE OBTAINED

In those cases where it has been held issues not pursued at trial are waived, the parties had previously been extended the due process protections of a trial including the right to cross-examine the witnesses against them. Trayner, supra, p 857, Rosenlof, supra, p 376. In Mascaro v Davis, 741 P2d 938, 944 (Ut 1987) the enforcement of a settlement agreement was at issue and it is unclear whether those parties enjoyed discovery or a trial to examine the issues the appeal court held should have been addressed below but which were in effect voluntarily waived through settlement.

Instantly Sellers below always objected to not having the opportunity to cross-examine the declarants whose unsworn statements

Buyers purported as the truth in Buyers' affidavit. R - 61-62. Such cross-examination at trial or deposition of declarants, whose statements Buyers offered as evidence, is a rudimentary due process right that tests credibility of the statements and promotes ascertainment of the truth rather than permitting the interjection of unqualified, unreliable and self-serving hearsay by Buyers who would not use a subpoena and discovery to obtain the name of the purported declarant and his testimony under oath thus precluding Sellers' cross-examination. R - 71. Buyers merely submitted inadmissable hearsay in their affidavit that they say the declarant said because the declarant from Mountain Fuel would not provide an affidavit swearing to what Buyers submitted. R - 110-111. Extending due process fairness is not a "merry-go-round," especially where Buyers have demonstrated a willingness to conceal the truth, like their recovery of money from their furnace inspector toward mitigation of damages.

Genuine issues of fact for the jury to decide exist below like whether the defect Buyers purport another found five days after the closing developed after the closing or before and what is the proper amount of damages, if any. It is Buyers' burden to persuade the jury by admissable evidence, not to avoid trial by unfair prejudicial hearsay contained in the affidavit which still does not swear whether the purported defect occurred before closing or after when Buyers allowed the residence to remain unheated for five days.

When plaintiffs like Buyers do not carry their burden of proof by submission of sufficient admissable evidence their case should be dismissed. Providing unreliable hearsay does not carry the burden or shift it to defendants.

Buyers say Sellers waived the right to cross-examine Buyers' hearsay declarants on discovery, however, when Buyers did not carry their burden of proof below regarding attorney fees at the motion hearing contrary to the Supreme Court holding in Cabrera and recovery of such fees was thereby waived, the lower court merely extended the Buyers the opportunity to provide the proofs subsequent to the hearing and punished Sellers for objecting to the unreasonability of those fees and pointing out that such evidence which was required by law to be submitted at or before the motion hearing also would have proven Sellers contention at that hearing - that Buyers submitted an inadmissable hearsay in Buyers' affidavit because the declarant would not swear an affidavit corroborating the statements Buyers ascribed to him. Sellers demanded cross-examination below and did not waive discovery or the right to a jury trial.

CONCLUSION

The seminal facts in this case are in question and the court below was precluded from usurping the fact finding function of the jury by deciding that if a defect may have been present five days after the closing it must have been present before the closing. Facts in Sellers' affidavit directly contradict this deduction since only they swear to the satisfactory operation of the furnace on the day of closing. Remand for trial and discovery should be granted, mooting the issue that attorney fees were awarded contrary to the case law cited and the contractual provision abrogating attorney fees.

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